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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WILLIAM D. GORE, as Sheriff of San
Diego County,

Plaintiff and Appellant,

v.

SAN DIEGO COUNTY CIVIL SERVICE
COMMISSION,

Defendant;

SAM KNIGHT,

Real Party in Interest and Respondent.

D069068

(Super. Ct. No. 37-201500014195-CU-
WM-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joan M.

Lewis, Judge. Affirmed.

Robert P. Faigin, Sanford A. Toyen and Kristin Beattie for Plaintiff and Appellant.

Bobbitt, Pinckard & Fields, Richard L. Pinckard and Charles B. Walker for Real Party in Interest and Respondent.

The San Diego County Sheriff's Department (Department) terminated Sam Knight, a deputy sheriff assigned to the George F. Bailey Detention Facility (Facility). The Department determined that as Knight escorted inmate Matthew Lyons to a recreation yard in August 2014, Knight applied unreasonable restraint on Lyons and then failed to report the use of force to the Department as required. Knight appealed the termination, and the San Diego County Civil Service Commission (Commission) found that Knight's use of force was reasonable; found that Knight failed to verbally report and to timely document the incident; modified the termination to a three-day suspension; and awarded Knight appropriate back pay, benefits and interest from the date of his removal.

William D. Gore, as Sheriff of San Diego County (the Sheriff), filed a petition for writ of administrative mandamus. (Code Civ. Proc., § 1094.5; further statutory references are to this code.) The superior court denied the petition, concluding that the Commission did not abuse its discretion — in part because substantial evidence supported the Commission's findings, and in part because the modified discipline was not an abuse of discretion.

The Sheriff appeals from the judgment. He contends that the Commission abused its discretion on two grounds: (1) the record does not contain substantial evidence to support the Commission's finding that Knight's use of force was reasonable and within Department policy; and (2) Knight's failure to report the incident warrants termination, regardless whether the use of force was reasonable or justified. Given the standard of

review that we must apply, we disagree with the Sheriff and affirm the superior court's judgment.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Consistent with our substantial evidence review of the trial court's judgment, discussed at part II.A.1., *post*, we present the conflicting evidence from Knight's administrative hearing in the light most favorable to the Commission's findings. (See *Kolender v. San Diego County Civil Service Com.* (2007) 149 Cal.App.4th 464, 470 (*Kolender*) [applying substantial evidence review to administrative decision]; *Auburn Woods I Homeowners Assn. v. Fair Employment and Housing Com.* (2004) 121 Cal.App.4th 1578, 1583 (*Auburn Woods*) [an appellate court " 'must view the evidence in the light most favorable to the Commission's findings and indulge in all reasonable inferences in support thereof' "].)

A. *Knight*

At the time of the incident in August 2014, Knight had been employed by the Department for seven years with no prior discipline. He was assigned as a detentions deputy in the administrative segregation unit (AdSeg) — also known as "house 5" — of the Facility.¹ As such, he was responsible for the care and custody of inmates who were assigned to an area identified for administrative segregation and disciplinary isolation.

¹ At the time, there were approximately 1,600 inmates and 40 Sheriff's deputies assigned to the Facility.

According to one witness, the Facility housed "the worst of the worst in the system," and AdSeg was "the worst module" in the Facility.

Knight's shift was from 6:00 p.m. to 6:30 a.m., and the incident occurred shortly after midnight on Friday, August 1, 2014, in the early morning hours of Saturday, August 2. This was during Knight's fourth workday in a row, having worked the three prior shifts beginning Tuesday, Wednesday and Thursday evenings.

Knight was 37 years old, stood 5'10" tall and weighed 210 pounds.

B. *Lyons*

At the time of the incident, Lyons was 22 years old, stood 6'4" tall and weighed 195 pounds. He was housed in Module C of AdSeg.

Knight understood that Lyons had psychological issues — which meant to Knight that Lyons was more disturbed than others and could be or was on medication for this condition. In fact, Lyons was on psychiatric medication to modify his aggressive behavior.

Knight considered Lyons a "cell warrior" — which Knight described as an inmate who threatens or insults others from within the safety of his cell.² For example, earlier during the week of the incident, Lyons announced to Knight that he was " 'like a pit bull that hasn't eaten in three days.' " In addition, Lyons recently had taunted Knight by

² The inmates assigned to AdSeg were also known for flooding their cells by clogging the toilets and repeatedly flushing, and for packing up and throwing urine and feces at anyone passing by the cells, although Knight did not state specifically that Lyons had participated in these activities.

telling Knight rude (and untrue) things about Knight's mother, sister and wife. Knight knew that Lyons was "on the Department's radar" — in part because deputies had used force on Lyons, Lyons had bruised deputies, and Lyons had fought with other inmates in the past.

C. *The Incident*

On the night of August 1, 2014, at the beginning of Knight's shift, one of the sergeants on duty asked Knight to take Lyons to the recreation yard if he (Knight) had the time. Knight was able to comply with this request at some time after midnight on August 1 and before 1:00 a.m. on August 2. The incident at issue here — i.e., Knight's use of force on Lyons — occurred as Knight and Lyons entered cell 3 of the recreation area. Exhibit 3 is a map of the route Knight used when he picked up Lyons at his cell in AdSeg and escorted him to cell 3 in the recreation yard.³ Exhibit 1 contains a number of video recordings that show Knight escorting Lyons from four different locations along the route.⁴ Exhibits 2 and E-N are prints of frames of the video submitted as exhibit 1.

³ We will use the exhibit numbers and letters that the parties used in the Commission hearing (which were all included as one exhibit in the trial court) and are part of the record on appeal.

⁴ At the Commission hearing, counsel for the Department explained that exhibit 1 contains various video files: four videos that cover more than an hour of time from different locations, including the 55 minutes Lyons was in the recreation yard cell by himself *after* Knight's use of force and before return to his AdSeg cell; and one video of less than six minutes that contains a compilation of portions of six videos that show Knight and Lyons walking toward the recreation yard and Knight leaving Lyons in the recreation yard cell *after* Knight's use of force. The videos do not contain any audio. We have reviewed each of these videos a number of times.

Picking up Lyons from AdSeg, Knight handcuffed Lyons, who was compliant. At all times in escorting Lyons, Knight used his right hand to hold Lyons's left arm above the elbow and walked a step behind and to the left of Lyons.

In the first part of the video, which lasts approximately eight seconds, Knight escorted Lyons down a flight of stairs (presumably from the level on which his AdSeg cell is located) into the dayroom of Module C, a large open area with a number of tables and chairs. As they left the staircase and began walking through the dayroom, Lyons turned his head a bit to the left — i.e., toward Knight.

The next part of the video, which lasts approximately 10 seconds, shows Knight and Lyons turning to their left out of the Module C dayroom and walking down a hallway. Once they passed through the door into the hallway, Lyons again turned his head slightly to the left — i.e., toward Knight.

In the subsequent approximately 20 seconds of the video, Knight and Lyons entered the recreation yard area — into an open angular room with doors to cells along the outside of the open area. About halfway to their destination, which was cell 3 on their left, Lyons again turned his head slightly to the left in Knight's direction.

The door to cell 3 was a heavy steel gate with fencing. At the end of this portion of the video, which was taken from the open area looking into cell 3, the angle only shows the open door and a few feet into the far left side of the entryway to cell 3. As Knight and Lyons entered cell 3, Lyons turned somewhat toward Knight before they were out of the view of the camera two steps later. In less than two seconds, as Lyons

remained ahead of Knight and out of view, the video shows Knight awkwardly taking a step backward toward the door as he leaned forward on one knee, mostly out of view.

The next two minutes of video are taken from a camera inside the far end of cell 3, looking out toward the door and the open angular room — i.e., toward the area from which Knight and Lyons came as they entered cell 3. The video starts before Knight and Lyons entered cell 3 and continues until Knight left the cell and locked the door with Lyons inside. (Thus, timewise, there is an overlap between the video taken from the open area looking at the door of the cell and the video taken from inside the cell looking out toward the open area.) As they entered cell 3, Knight was still a step behind and to the left of Lyons and with his right hand holding Lyons's left bicep. At this point, as Lyons was talking to Knight, Lyons stopped without warning (or orders), breaking Knight's stride and forcing Knight to stop before he could close the door to cell 3. At the same time, Lyons turned his upper body, hips and feet to his left (back toward Knight and no longer facing forward) and turned his head even further to the left, almost all the way around to Knight's face, less than 12 inches away.

Knight took his left (free) arm and wrapped it around Lyons's neck from the back; Knight then released his right hand from Lyons's (still handcuffed) arm; Knight pushed his right forearm into the back of Lyons's head; and Knight leaned into Lyons, forcing him to his knees. According to Knight, he reacted in a millisecond to Lyons stopping,

turning toward him and standing over him less than a foot away.⁵ Even though Lyons began apologizing (though the record does not disclose for what), he nonetheless resisted and struggled with Knight the entire time Knight attempted to control him. Knight kept pressure on Lyons's neck, completing the takedown by use of force or restraint on Lyons's neck.⁶ Continuing to apply this restraint, for the next approximate half minute Knight struggled to get Lyons to the ground on his side. The sergeant who investigated the incident reported to the Department and confirmed at the Commission hearing that the video shows that, during the duration of the hold, Lyons was "possibly resisting, too."

Once Knight positioned Lyons on his side, Knight released the restraint and tapped Lyons's face a couple of times. Knight then talked to Lyons, turning him on his back and again tapping his face a couple of times. On both occasions, Knight intended the taps on Lyons's face to establish control and respect from an inmate with whom he had just had a physical altercation. At this point, as Lyons lay compliantly on the floor face down, Knight leaned over him with Knight's knee in his back and took off the handcuffs; Knight then left cell 3, closing and locking the door. Lyons remained on his stomach for approximately five seconds, after which time he stood up, appeared to look

⁵ Knight's use of force expert testified that 0.5 to 0.75 of a second will pass during the time in which a trained officer will see a threat, recognize it as a threat and respond to it.

⁶ Throughout the proceedings, including this appeal, the parties have used various terms to describe the force Knight applied — e.g., carotid restraint hold, neck restraint, takedown, etc. Knight acknowledges that he used a carotid (or neck) restraint hold and that it was a "use of force" that required a report. The name of the force used is not relevant to the determination of the issues presented on appeal.

into the camera, shook his head, straightened his clothes and began walking around cell 3.

The video shows Knight picking up Lyons from cell 3 approximately 55 minutes later. Once Lyons heard Knight outside the door of cell 3, Lyons approached the door, faced backwards, placed his hands through the food flap and outside the cell, and stood still while Knight attached handcuffs. Knight then opened the door to cell 3 and escorted Lyons back to Module C, through the dayroom and up the staircase, where the video recording began. On the return trip, Lyons was calm and compliant; Knight stayed a step or two behind Lyons, but did not hold onto him.

After serving breakfast at the end of his shift on August 2, Knight went home without mentioning the use of force on Lyons to anyone.

The Department has rules and procedures for reporting incidents — which require both verbal and written reports — when a deputy uses force on an inmate. Knight acknowledges both that he used force on Lyons before leaving him in cell 3 and that he failed to comply with the reporting process although he understood it. In this latter regard, Knight fully and properly reported his use of force on another inmate toward the end of the same shift. With regard to his failure to report his use of force on Lyons, Knight stated, " 'I have no explanation; I just blanked out.' "

D. *The Department Terminates Knight*

Early in the evening of August 2, 2014, Knight returned to work for his next scheduled shift. Just prior to the deputies' briefing at the beginning of the shift, one of the lieutenants approached Knight and told him that Lyons alleged Knight had used

excessive force the night before and that the allegations would be referred to the Department's Internal Affairs Unit (IA) for investigation. A few hours later, Knight went to the lieutenant and acknowledged that the job was getting to him and that he (Knight) had made a mistake.

After discussing the incident with his captain and before making the IA referral, the lieutenant viewed the video. Based on Knight's use of force shown on the video and the knowledge that Knight had not reported the incident, the lieutenant recommended as appropriate discipline that Knight's employment with the Department be terminated. The recommendation was not based on how Knight administered the use of force, but rather on the impropriety of using *any* force in this instance — coupled with what the lieutenant described as "a truthfulness issue" triggered by Knight's failure to report the incident.

In late October 2014, Knight's captain sent Knight a formal notice of intent to terminate employment, including the five charges on which the intended termination was based.⁷ This notice also advised Knight of the deadline by which he was entitled to request "a *Skelly* Conference."⁸

⁷ The notice identified five causes for termination:

"You are guilty of harm to the public, . . . in that: On August 2, 2014, you physically abused and/or mistreated inmate Matthew Lyons by using a carotid restraint and/or a neck restraint that was not in compliance with established Departmental Procedures." (Cause I);

"You are guilty of failure of good behavior, . . . in that: On August 2, 2014, you used force that was not reasonably necessary when you placed Inmate Matthew Lyons in a carotid restraint and/or a neck restraint. Your use of force on a non-resistant and non-assaultive inmate was not in accordance with established Departmental Procedures." (Cause II);

A captain presided over Knight's *Skelly* hearing and provided a 10-page, single-spaced typewritten report in November 2014. The captain concluded that Knight's due process rights had been preserved and that the lieutenant's recommendations and proposed discipline were reasonable and should be followed. A commander, an assistant sheriff, the undersheriff and the Sheriff each reviewed and approved the captain's report from the *Skelly* hearing.

Following this review and approval, in early December 2014, the Sheriff formally ordered Knight terminated based on "each and all" of the five causes set forth in the Department's notice. (See fn. 7, *ante*.)

"You are guilty of inefficiency . . . , in that: On August 2, 2014, you were involved in a use of force and failed to notify your supervisor. Not until you were confronted during the next shift did you acknowledge a use of force occurred. Employees shall submit all necessary reports on time and in accordance with established Departmental procedures. In particular, Deputies who use force to overcome resistance or to control or apprehend a subject must verbally inform their supervisor as soon as practical, but in no event later than the end of shift." (Cause III);

"You are guilty of incompetency . . . , in that: On August 2, 2014, you were involved in a use of force and failed to document the incident. Employees shall submit all necessary reports on time and in accordance with established Departmental procedures. In particular, all Deputies using force must clearly articulate the force used in writing." (Cause IV); and

"You are guilty of acts that are incompatible with and/or inimical to the public service You are guilty of acts, which are incompatible with the San Diego County Sheriff's Department Executive Order and the Mission, Vision, Values and Goals. Your conduct constituting such acts inimical to the public service is set forth under Causes I through IV above." (Cause V). (Bolding omitted.)

8 Under *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 (*Skelly*), a public employee like Knight is entitled to proper notice of an intended disciplinary action and a fair chance to respond to the charges before implementation of any discipline.

E. *The Posttermination Proceedings*

Knight timely appealed the Sheriff's order terminating his employment with the Department.

On February 26 and March 13, 2015, the Commission conducted Knight's requested appeal hearing. The commissioner heard testimony from nine witnesses, received 29 exhibits into evidence, listened to the argument of counsel and took the matter under submission. On April 9, 2015, the Commission served the Sheriff and Knight's counsel with copies of its decision, including the commissioner's findings, conclusions and proposed recommendations.

According to the Commission's findings, the Department did not prove Causes I (harm to the public), II (failure of good behavior) or V (conduct incompatible with public service), which related to Knight's use of force. While we will discuss specific findings as necessary in the Discussion, *post*, in short the Commission found that "[Knight] acted reasonably when he applied the neck restraint to regain control of [Lyons]."

According to the findings, the Department proved Causes III (verbal notification) and IV (written documentation), which related to Knight's failure to report the use of force. Indeed, Knight had admitted each of these causes at the hearing.

Based on the foregoing, the Commission modified the Department's order of termination to a three-day (24-hour total) suspension for Knight and awarded Knight appropriate back pay and related benefits.

The Sheriff sought judicial review of the Commission's decision by timely filing a petition for writ of administrative mandamus in the superior court. (§ 1094.5.) The court

stayed the Commission's decision pending resolution of the writ proceeding. The parties briefed the issues raised in the Sheriff's petition, and the court held a hearing in August 2015. The court ruled that substantial evidence supported the Commission's findings, and the Commission did not abuse its discretion in modifying the discipline from termination to a three-day suspension.

The superior court entered judgment, Knight gave notice and the Sheriff timely appealed.

II.

DISCUSSION

The Sheriff filed the underlying administrative mandamus petition under section 1094.5, which provides in relevant part:

"(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the [Commission], the case shall be heard by the court sitting without a jury. . . .

"(b) The inquiry in such a case shall extend to the questions whether the [Commission] has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. *Abuse of discretion is established if* the [Commission] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or *the findings are not supported by the evidence.*

"(c) Where it is claimed that the findings are not supported by the evidence, . . . *abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.*" (Italics added.)

Where, as here, the underlying administrative mandamus case does not involve a fundamental vested right,⁹ on appeal " 'we review the administrative decision, not the superior court's decision.' " (*Kolender, supra*, 149 Cal.App.4th at p. 470, italics omitted.)

On appeal, the Sheriff raises two arguments: (1) the Commission erred in finding that Knight acted reasonably and within Department policy when he used force on Lyons; and (2) the Commission erred in modifying the discipline and reinstating Knight. As we explain, (1) substantial evidence supports the Commission's findings as to Knight's use of force, and (2) the Commission did not abuse its discretion in modifying Knight's discipline.

A. *Decision as to Knight's Use of Force*

1. *Standard of Review — Substantial Evidence*

" '[O]ur function is identical to that of the trial court, as we too must determine whether substantial evidence supports the administrative decision.' " (*Hoitt v. Department of Rehabilitation* (2012) 207 Cal.App.4th 513, 521 (*Hoitt*); accord, *Schafer v. City of Los Angeles* (2015) 237 Cal.App.4th 1250, 1261 [appellate court applies the same standard of review as trial court]; *Kolender, supra*, 149 Cal.App.4th at p. 470.) " 'The reviewing court, like the trial court, may not reweigh the evidence, and is "bound to consider the facts in the light most favorable to the [Commission], giving it every

⁹ " '[A]n employer's right to discipline or manage its employees . . . is *not* a fundamental vested right entitling the employer to have a . . . court exercise its independent judgment on the evidence.' " (*Kolender, supra*, 149 Cal.App.4th at p. 470.)

reasonable inference and resolving all conflicts in its favor." ' ' " (*Hoitt*, at p. 522; accord, *Auburn Woods*, *supra*, 121 Cal.App.4th at p. 1583.)

Subdivision (c) of section 1094.5, quoted *ante*, requires us to consider the Commission's findings "in the light of the whole record." Thus, we do not isolate the evidence supporting the findings at issue, but rather "consider[] all relevant evidence, including that which detracts from the decision." (*Hagopian v. State of California* (2014) 223 Cal.App.4th 349, 360 [§ 1094.5 review of Coastal Commission findings].) In doing so, however, we may reverse "only if, based on the evidence before the [Commission], a reasonable person could not reach the [Commission's] conclusion." (*Ibid.*) Stated differently, an appellate court " 'must uphold the Commission's decision unless the review of the entire record shows it is so lacking in evidentiary support as to render the decision unreasonable.' " (*Auburn Woods*, *supra*, 121 Cal.App.4th at p. 1583, italics added [§ 1094.5 appellate review of agency determination of discrimination].)

There is a presumption that the Commission's findings are supported by substantial evidence, and the Sheriff (as appellant) has the burden of demonstrating otherwise. (*Schutte & Koerting, Inc. v. Regional Water Quality Control Bd.* (2007) 158 Cal.App.4th 1373, 1384.)

2. *Substantial Evidence Supports the Commission's Findings as to Knight's Use of Force*

In relevant part, the Commission found that Knight "acted reasonably when he applied the neck restraint." Leading up to that ultimate finding, the Commission also

found: the video "seem[ed] slow,"¹⁰ which meant that "the viewer misses some of the action[,] and the action that is viewed is speeded up"; for example, one of the still frames printed from the video "more clearly shows [Lyons] turning in on [Knight] and coming face to face with him"; "everything important" — i.e., Knight's decision to use force as he and Lyons entered cell 3 in the recreation yard — "occurred in less than one second"; Knight "had between .5 and .7 seconds to react to [Lyons] turning in on him"; Knight "was caught mid-step when [Lyons] turned on him,"; Knight "was able to demonstrate perfect form in regaining control with the neck restraint"; and "[Lyons] was never unconscious." (*Italics added.*)

Witnesses for both Knight and the Department agreed that the video did not tell the entire story. The captain who signed the notice of intent to terminate Knight's employment and who presided over the *Skelly* hearing testified that the best evidence of what is seen in the video would come from the statements of the parties involved. According to the Department's use of force expert, a determination of the reasonableness of preemptive force can only be made after knowing exactly what Knight "felt, . . . observed, and heard." Knight's use of force expert testified that what Knight described from his perception — i.e., what Knight saw, felt and heard — was not contradicted by anything in the video.

¹⁰ The Commission noted that "security videos typically have a 'low frame rate', i.e., 4-12 frames per second as compared to TV or movies, which have a frame rate of around 29 per second."

The Commission expressly found that Knight — who testified in detail as to what he saw, felt and heard and who could have attributed statements to Lyons that never occurred — was a credible witness.

The Sheriff contends that the record does not contain substantial evidence in support of the finding that Knight acted reasonably in using force on Lyons as they entered cell 3 in the recreation area. He presents two arguments: (1) Knight's use of the carotid restraint was not objectively reasonable under federal constitutional standards; and (2) Knight's use of the carotid restraint exceeded the force allowed under Department policy. Neither argument has merit.

a. *United States Constitution*

Under the Fourth Amendment to the United States Constitution, a peace officer's use of force is analyzed under a standard of objective reasonableness. (*Graham v. Connor* (1989) 490 U.S. 386, 396-399 (*Graham*) [civil rights action based on alleged excessive force in violation of the Fourth Amendment].) "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." (*Graham*, at p. 397.) "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain and rapidly evolving — about the amount of force that is necessary in a particular situation." (*Id.* at pp. 396-397.)

The test of reasonableness is " 'not capable of precise definition or mechanical application,' " but rather requires a fact-specific inquiry into the officer's actions and the circumstances surrounding them. (*Graham, supra*, 490 U.S. at p. 396.) The test "is highly situational and fact specific, and in applying the test, the [Commission's] task not only permitted but required it to apply its own independent sense of reasonableness, using whatever community norms [it] might bring to the issue." (*People v. Brown* (2016) 245 Cal.App.4th 140, 167, citing *Graham*, at p. 396.)

The Sheriff contends that the record lacks substantial evidence to support the finding that Knight's use of the neck restraint was reasonable, because the video establishes that the use of force was "not in response to any imminent threat of harm from Lyons." According to the Sheriff, "when Lyons turned his head slightly, Knight interpreted that movement as the beginning of a *possible* attack." There are a number of problems with the Sheriff's argument.

First, we disagree with the Sheriff's suggestion that, under *Graham*, we are precluded from considering Knight's subjective belief that Lyons could harm him. In order for us to determine whether Knight's actions were " 'objectively reasonable,' " we must be fully informed and consider *all* of "the facts and circumstances confronting" Knight at the time he applied the neck restraint (*Graham, supra*, 490 U.S. at p. 397) — "including what the officer knew at the time" (*Kingsley v. Hendrickson* (2015) __ U.S. __, __ [135 S.Ct. 2466, 2473]). Only then will we have "the perspective of a reasonable officer on the scene" as *Graham* requires at page 396. Accordingly, in addition to the

evidence contained in the video, we must also consider the evidence in Knight's testimony regarding his perceptions during the incident.¹¹

Second, the evidence in support of the Commission's findings does not support the Sheriff's characterization of Lyons's movements as merely "turn[ing] his head slightly." From the beginning of the video until Knight applied force, Lyons turned his head toward Knight four times: first, in the dayroom at the bottom of the stairs; second, in the hallway between the dayroom and the recreation area; third, in the central angular space in the recreation area; and fourth, in cell 3 immediately before Knight's use of force. On the first three occasions, Lyons did turn his head only "slightly" toward Knight. In contrast, on the fourth occasion Lyons turned his entire upper body toward Knight with his chin turned more than 45 degrees to the left and over his shoulder with his hips and feet turned toward Knight and no longer facing front — with his head less than a foot away from Knight's head.¹² Moreover, on the first three occasions, Lyons kept walking a pace in

¹¹ We reject the Sheriff's suggestion that we consider only the video and Knight's pretermination statements to the Department's investigators. Neither we nor the Sheriff is so limited. We must consider "the *whole* record" (§ 1094.5, subd. (c), italics added; see *Auburn Woods, supra*, 121 Cal.App.4th at p. 1583 [we must review " 'the *entire* record' " (italics added)]); and a party like the Sheriff who fails to set forth *all material evidence* (not just the evidence supporting that party's position) may be deemed to have waived substantial evidence review on appeal (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881).

¹² We disagree with the Sheriff's description of the video as showing that "Lyons'[s] face does not close in on Knight." (Underscoring omitted.) In any event, Knight's testimony — which we must credit given the presumptions on appeal — was that, as soon as Knight entered cell 3, "the first thing I saw was *Lyons'[s] face closing in on mine.*" (Italics added.)

front and to the right of Knight as suggested by the Sheriff. In contrast, immediately prior to the fourth turn of his head, Lyons stopped without warning, broke Knight's stride and forced Knight to stop before he could close the cell door.

Third, we disagree with the Sheriff's suggestion that what Knight described as a "potential threat" was not objectively reasonable. In support of his position, the Sheriff relies on Knight's statements at his *Skelly* hearing (which the Sheriff acknowledges contradict Knight's testimony at the Commission hearing) and on the Sheriff's interpretation of the evidence in the video (which the Sheriff contends "shows clearly" that Lyons was not facing Knight). However, the Sheriff's argument ignores the standard of review. The issue is not whether the record contains evidence which might support a finding that Knight did not act reasonably, but whether the record contains substantial evidence to support the finding actually made, namely, that Knight's use of force was reasonable. (See *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 872-873.) The existence of contradictory evidence, even strong contradictory evidence, does not make the contradicted evidence insubstantial.

Fourth, the Sheriff does not accept Knight's stated purpose for applying the neck restraint — namely, that as Knight entered cell 3, Lyons's actions signaled a potential threat.¹³ Rather, the Sheriff contends that Knight applied the neck restraint in retaliation

¹³ At oral argument, counsel for the Sheriff suggested that Department policy precluded a deputy from walking into a cell with an inmate like Lyons. Counsel stated (and argued in the briefing, citing exhibit 6) that the proper procedure would have been for Knight to have released Lyons into cell 3 and locked the door and then for Lyons to have placed his hands and wrists through the food flap in the door so that Knight could

for the insulting comments Lyons previously made to Knight about his family. Under *Graham*, however, "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force" (*Graham, supra*, 490 U.S. at p. 397.) The issue is whether Knight's actions were " 'objectively reasonable' " based on the facts and circumstances known to Knight, "*without regard to [Knight's] underlying intent or motivation.*" (*Ibid.*, italics added.)

Finally, we reject the Sheriff's argument that the "potential threat" described by Knight was insufficient to justify a use of force.¹⁴ Under an objective view of the facts and circumstances confronting Knight, the evidence establishes: Knight knew that Lyons, as an AdSeg inmate, had been isolated from others for administrative and

unlock the handcuffs. Although exhibit 6 does set forth a required procedure for escorting inmates like Lyons, the procedure does not preclude walking the inmate a few steps into the cell before releasing the inmate — just as Knight did here before what he perceived as the potential threat. Moreover, the Department's use of force expert agreed that, although "the procedure" is for the deputy proceed as described in exhibit 6, "there are situations where a deputy just takes the cuff off a guy, and he moves into his cell." On cross-examination the expert conceded that there is nothing in exhibit 6 that precluded Knight from entering the cell to unlock Lyons's handcuffs. Consistently, a deputy who had been employed by the Department for 27 years testified that the Department gives its deputies discretion whether to use the food flap in a cell door to unlock an inmate's handcuffs.

¹⁴ The Sheriff argues that a "potential threat" cannot justify the use of a neck restraint. We need not decide (and express no opinion) whether a neck restraint is necessarily unreasonable following a mere potential threat, as suggested by the Sheriff. When we consider *all* the evidence — indulging reasonable inferences therefrom (*Hoitt, supra*, 207 Cal.App.4th at p. 522; *Auburn Woods, supra*, 121 Cal.App.4th at p. 1583) — as we describe in the remainder of the paragraph in the text, *post*, Knight was presented with *more* than the mere potential of a threat. Consistently, the lieutenant who conducted the IA investigation testified at the Commission hearing that Knight said that he actually (not potentially) felt threatened when Lyons turned toward him as they entered cell 3 in the recreation area.

disciplinary purposes in a prison that housed "the worst of the worst in the system"; Knight knew that Lyons had a record of disruptive and assaultive behavior while in custody; Knight knew that Lyons had psychological issues and could be on medication for this condition; Lyons had threatened Knight and other deputies in the past, and recently Lyons had told Knight that he was " 'like a pit bull who hasn't been fed in three days. I'm just going to be a nightmare for any deputy who comes near me.' "; Lyons was 22 years old, and Knight was 37; Lyons stood 6' 4" tall, whereas Knight was 5' 10"; Lyons weighed 195 pounds and was physically healthy, muscular and spry, compared with Knight who weighed 210 pounds; as they entered cell 3 in the recreation area, Lyons suddenly tensed,¹⁵ stopped without warning, broke Knight's stride and forced Knight to stop before he could close the cell door; at the same time, Lyons turned his upper body, hips and feet back toward Knight and turned his head even further, almost all the way around to Knight's face, less than 12 inches away; Knight "felt" that "he [Lyons] was going to confront me [Knight] physically"; and once Knight felt Lyons "closing in on [him]," Knight and quickly reacted, "kn[owing] if [he] had control of [Lyons], [Lyons] wouldn't be able to do anything to harm [Knight]."

Based on the standard in *Graham* and recognizing the need to consider the totality of the circumstances, Knight's use of force expert testified that Knight reasonably

¹⁵ Knight had told his use of force expert that immediately before initiating the neck restraint, he had felt tension in Lyons's bicep. On that basis, the expert included in his written report, which was before the Commission, the fact that "[Lyons s]uddenly tensed and turned on [Knight]"; and that statement was read into the record during the expert's testimony.

perceived a threat and appropriately responded to it and that there were no other responses that Knight could have used to control Lyons that would have been safer to both Knight and Lyons. The expert also testified that a reasonable deputy in Knight's position would have perceived the same threat (that Lyons "was going to turn on him").

Having analyzed the entire record, we conclude that it contains substantial evidence to support the Commission's finding that Knight acted reasonably in his use of force on Lyons in the early morning hours of August 2, 2014.

b. *Department Policy*

The Sheriff also argues that, regardless whether Knight's use of force was reasonable under *Graham*, Knight's termination was justified under what the Sheriff calls "Department policy." Although the Sheriff provides no legal authority for his position, we will assume without deciding that the Department *may* set policies that require less force than the " 'objectively reasonable' " standard under the Fourth Amendment, as established in *Graham, supra*, 490 U.S. at page 397, discussed at part II.A.2.a., *ante*.

The Sheriff relies on a document entitled "San Diego County Sheriff's Department — Addendum Section F" (Addendum F). As pertinent to the arguments the Sheriff raises on appeal, Addendum F provides in part as follows:

"ADDENDUM F SECTION USE OF FORCE GUIDELINES [¶] . . . [¶]

"POLICY:

"All sworn personnel . . . , as authorized by law, may use physical force in the performance of their duties when *the need for such force is legally justified and necessary, as well as reasonably and legally applied*. The use of force and subsequent reporting must be in accordance with the

procedures set forth in these guidelines (see Policy and Procedures Section 6.48)." (Italics added.)

"FORCE OPTIONS [¶] . . . [¶]"

"Levels of Resistance: [¶] . . . [¶]"

"**Active resistance** refers to overt physical actions intended to prevent a deputy's control, but that does not attempt to harm the deputy.

"**Assaultive behavior** is represented by conduct that suggests *the potential for human injury. Such behavior may be conveyed through body language, verbal threats and/or physical actions.*" (Italics added.)

"CONTROL COMPLIANCE TECHNIQUES:"

"When a deputy needs to . . . restrain an in-custody subject and the individual's actions are *actively resistant or aggressive*, reasonable compliance techniques such as . . . *pressure point tactics* (touch & penetrating pressure, non[-]striking) . . . *may be necessary to obtain control and compliance.* [¶] . . . [¶]"

"Carotid Restraint: [¶] . . . [¶]"

"*The carotid restraint may be used on subjects who are actively resisting or assaultive.*" (Italics added.)

Based on these provisions, the Sheriff contends that Knight violated Department policy "when he used the carotid/neck restraint on inmate Lyons[,], because Lyons wasn't actively resisting or aggressive towards Knight." Under these provisions, the Sheriff argues: "*The videos make clear* that Lyons did not need to be assaulted or restrained[.]" and "no force was appropriate *under the facts and circumstances presented in the video.*" (Italics added.) Further, relying only on the Department's witnesses' testimony *based on what they saw on the video*, the Sheriff argues that the Commission's finding "leaves this Court to conclude that all of these accomplished and distinguished sworn members of the San Diego County Sheriff's Department apparently don't understand the Department's

own use of force policy as well as Knight." We disagree. In presenting this argument, the Sheriff again fails to appreciate the standard of review under which we must decide the issue: We are required to consider, without weighing, all evidence from the entire record (not from just the Sheriff's witnesses or the video), indulging all inferences in favor of the Commission's findings. (*Hoitt, supra*, 207 Cal.App.4th at p. 522; *Auburn Woods, supra*, 121 Cal.App.4th at p. 1583.) The Sheriff's failure to have done so is fatal is to his position on appeal.

Addendum F expressly allows the use of a carotid restraint on inmates "who are actively resisting or assaultive." The Department's captain who upheld the Department's intended discipline at Knight's *Skelly* hearing testified at the Commission hearing. According to the captain, both the IA report and the *Skelly* hearing report confirm that Lyons "continued to resist and move throughout the video" — which supports a finding of "active resistance" for purposes of Addendum F. Likewise, as Knight testified (and explained to the sergeant during her IA investigation), at the time he and Lyons entered cell 3, Lyons's body language and/or physical actions suggested "the potential for human injury" — namely, the risk of injury to Knight himself — which constitutes "assaultive behavior" for purposes of Addendum F.

Since Addendum F expressly authorized Knight's use of force here, the record contains substantial evidence of both resistance and assault by Lyons sufficient to support a finding that, at the time Knight and Lyons entered cell 3, Knight's use of force on Lyons was reasonable under Department policy.

B. *Decision as to Knight's Discipline*

1. *Standard of Review — Abuse of Discretion*

Like the prior issue, we review the Commission's decision modifying Knight's discipline (from termination to a three-day suspension) under the same standard applied by the superior court. (*Kolender, supra*, 149 Cal.App.4th at p. 470.) " ' ' ' 'The penalty imposed by an administrative body will not be disturbed in mandamus proceedings unless an abuse of discretion is demonstrated. . . . Neither an appellate court nor a trial court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed.' " ' ' ' ' (*Cate v. State Personnel Bd.* (2012) 204 Cal.App.4th 270, 283-284 (*Cate*); see *Skelly, supra*, 15 Cal.3d at p. 217.)

An abuse of discretion occurs where the administrative decision imposing the discipline manifests "an indifference to public safety and welfare." (*Hankla v. Long Beach Civil Service Com.* (1995) 34 Cal.App.4th 1216, 1222 (*Hankla*).) "If reasonable minds may differ as to the propriety of the penalty imposed, there has been no abuse of discretion. [Citation.] It is only in the exceptional case, when it is shown that reasonable minds cannot differ on the propriety of the penalty, that an abuse of discretion is shown." (*Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 46-47 (*Deegan*).)

On appeal, "some deference should be accorded to the Commission with respect to the degree of punishment imposed" (*Kolender, supra*, 149 Cal.App.4th at p. 471), though we give "no deference to the trial court's decision on the issue" (*Cate, supra*, 204 Cal.App.4th at p. 284).

2. *The Commission Did Not Abuse Its Discretion in Modifying Knight's Discipline*

The Sheriff contends that even if substantial evidence supports the Commission's finding that Knight's use of force was reasonable, the Commission abused its discretion in modifying the discipline, because Knight's failure to report the incident justified the termination of Knight's employment. In support of his position, the Sheriff emphasizes the need for a deputy to self-report a use of force, as well as the Department's requirement for such a report. We agree that these are valid and important concerns, since noncompliance has the potential to affect public safety and welfare. " 'The public is entitled to protection from unprofessional employees whose conduct places people at risk of injury and the government at risk of incurring liability.' " (*Kolender, supra*, 149 Cal.App.4th at p. 471, quoting from *Hankla*, at p. 1223.) However, in our review of the record in this case, the Commission's decision does not reach the level of "manifest[ing] *an indifference to public safety and welfare*" — which is required before we can conclude on appeal that the agency abused its discretion. (*Hankla, supra*, 34 Cal.App.4th at p. 1222, italics added.)

The "overriding consideration" in determining whether the Commission abused its discretion in disciplining Knight "is the extent to which [Knight's] conduct resulted in, or if repeated is likely to result in, '[harm] to the public service,' " though other relevant factors include "the circumstances surrounding the misconduct and the likelihood of its recurrence." (*Skelly, supra*, 15 Cal.3d at p. 218; see *Hankla, supra*, 34 Cal.App.4th at pp. 1222-1223.) On appeal, our inquiry is whether the Commission adequately addressed

the possibility of harm to the public service (i.e., "indifference to public safety and welfare") from Knight's conduct, in light of all the circumstances surrounding the misconduct and the likelihood of recurrence. (*Hankla*, at p. 1222.)

With regard to the Commission's consideration of all the circumstances surrounding the misconduct, we know from the detailed summary of the evidence and related findings that the Commission was well informed of these circumstances. With regard to the likelihood of recurrence, we know that Knight had been employed by the Department for seven years with no prior discipline.

Although the Commission did not specifically mention the potential harm to the public service from Knight's failure to report, the Commission based its discipline on a review of prior instances in which the Department had punished deputies for failing to have documented the use of force: after an incident involving "the 'pushing, pulling and grabbing' of an inmate numerous times for failing to follow a verbal command," the deputy received a reprimand; whereas, after an incident involving "the application of a 'hammer lock' on an inmate, pushing the inmate into an elevator wall and forcing him to the ground," the deputy received a three-day suspension. The Commission then found that because Knight's use of force "closely resembles the application of a 'hammer lock,'" the Commission imposed a three-day suspension for Knight.

While we acknowledge that there is no requirement that similar charges must result in identical punishment (*Kolender, supra*, 149 Cal.App.4th at p. 473), there is also no requirement that the disciplining authority not consider similar situations. In the present case, we conclude that the Commission's use of and comparison with other

instances of a deputy's failure to report a use of force adequately takes into account the potential harm to public safety and welfare.

Notably, the Sheriff's presentation on appeal does not include an argument explaining how or why the initial determination by the Commission was an abuse of discretion — i.e., how or why "reasonable minds cannot differ on the propriety of the penalty" (*Deegan, supra*, 72 Cal.App.4th at p. 47). Instead, the Sheriff's presentation on appeal more resembles a closing argument in support of an initial determination — i.e., why the evidence on which the Sheriff relies (the video and selected testimony from Department officials based on the video) justifies a termination of employment.¹⁶

For the foregoing reasons, the Sheriff has not met his burden of establishing that the Commission abused its discretion in modifying Knight's discipline from termination of employment to three days of suspension.

C. *Conclusion*

We have watched the video, exhibit 1, numerous times. We also have reviewed closely the testimony from at least five very senior Department professionals — namely, a sergeant with 13 years' experience; a lieutenant with 24 years' experience; another lieutenant with 22 years' experience; a captain with 25 years' experience; and an assistant sheriff with 23 years' experience. Even though the evidence from these sources

¹⁶ Even if the issue were being decided in the first instance, the Sheriff's argument is not persuasive. The testimony from the Department's employees on which the Sheriff relies was consistent: Knight's unreasonable use of force *coupled with* Knight's failure to report the use of force justified a termination of employment. The Sheriff does not cite to any evidence of what the Department considered appropriate discipline for the failure to report a *reasonable* use of force.

overwhelmingly supports the Sheriff's decision to terminate Knight, that is not the standard we apply on appeal; rather, we must consider the entire record. Nor do we balance or weigh the strength of the evidence from these sources against the evidence on which the Commission relied in making its findings; rather, we must consider only the substantiality of the evidence in support of the findings actually made.

Accordingly, as we explained in parts II.A. and II.B., *post*, substantial evidence supports the Commission's findings as to Knight's use of force, and the Commission did not abuse its discretion in modifying Knight's penalty.

DISPOSITION

The judgment of the superior court is affirmed. Knight is entitled to his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

IRION, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.